

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

75-7474

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To be Argued by
Roy M. Cohn

UNITED
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MAJESTY MUSIC CORPORATION,
ARCT MUSIC COMPANY, INC.
and SEALARK ENTERPRISES, INC.,

Plaintiffs-Appellees,

- against -

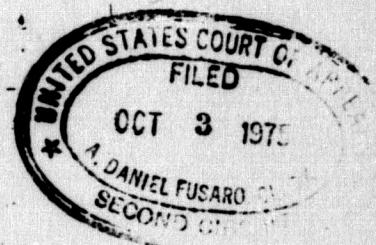
MUSICOR RECORD CORPORATION, et al.,

Defendants,

MUSICOR RECORD CORPORATION and
TALMADGE PROMOTION CO., INC.,

Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



APPELLANTS' BRIEF

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JANUARY MUSIC CORPORATION,
ARCH MUSIC COMPANY, INC.,
and SEALAPK ENTERPRISES, INC.,

Plaintiffs-Appellees,

- against -

MUSICOR RECORD CORPORATION, et al.,

Defendants,

MUSICOR RECORD CORPORATION and
TALMADGE PRODUCTION CO., INC.,

Defendants-Appellants

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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ISSUES PRESENTED

- I. WHETHER THE DISTRICT COURT SHOULD HAVE DECLINED SUBJECT MATTER JURISDICTION TO ENTERTAIN THIS ACTION
- II. WHETHER THE LICENSES, AS APPLIED TO MUSICOP, ARE PROPERLY BASED ON A 1 1/2¢ RATE FOR ALL PRE-1964 RECORDINGS USED IN ALBITS, AND WHETHER ALL RECORDS SHOULD BE ACCOUNTED FOR ON A MANUFACTURED AND SOLD BASIS

PRELIMINARY STATEMENT

This is an appeal from the decision of the Honorable Thomas P. Griesa, Judge of the United States District Court, Southern District of New York, dated June 3, 1975, after trial without a jury, and the Judgment filed thereon on August 1, 1975, which awarded the plaintiffs-appellees judgment in the total amount of \$55,139.83 plus interest from various dates on specific items, totalling \$77,632.38 (349a) *. Additionally, other grounds for reversal exist.

Appellants also contend that funds awarded were not due and owing, and that the court below ignored the uncontested proof of custom and use, the series of audits, and the fact that the applicable licensing agreements serve to establish no liability. Additionally, it is appellants' claim that as this action is nothing more than a state court contract and accounting action, and not a copyright issue, and that the District Court should have declined subject matter jurisdiction, as appellants moved repeatedly that it should do. The acceptance of federal jurisdiction over what is clearly an accounting action belonging in the state court can but add to the proliferation of cases improvidently entertained by Federal Courts, which certainly have enough matters before them without opening the floodgates to local cases which do not belong there.

STATEMENT OF FACTS

In or about 1960 Art Talmadge, president of Talmadge

* References are to pages in the Appendix; 'Ct X' refers to a Court Exhibit; 'PX' refers to an exhibit of the plaintiff, and; 'DX' refers to an exhibit of the defendant; 'Tr.' refers to pages in the trial transcript.

Productions Co., Inc., successor to Musicor Record Corporation, and Aaron Schroeder, president of the plaintiffs-appellees, entered into a business relationship in the form of Musicor Record Corporation, with Talmadge and Schroeder each owning one-half of Musicor. Various licenses were issued by January, Arch and Sealark to United Artists for the purpose of distributing the Musicor records.

In or about June, 1964, Talmadge bought out Schroeder's interest in Musicor for a total price of \$160,000. (PX 20, 709a) Shortly thereafter, in October 1964, Musicor took over the distribution of its records from United Artists. New licenses were allegedly issued by January, Arch and Sealark to Musicor for those songs previously distributed by United Artists. (PX 1-4, 650a) The United Artist licenses provided for a 2¢ payment for all records manufactured and sold. The 'new licenses' issued to Musicor in December of 1964, dated October 4, 1964, provided for payments to be made on all records manufactured. The appellants contend that these licenses were never properly executed and rely upon the United Artists licenses as successors in interest to United Artists. The new licenses specifically provided that they did not supersede any existing licenses for the same recordings (PX 1-4, 650a). The United Artist licenses were pre-existing licenses for exactly the same recordings (DX 101 6 ff., 751a-845a). The appellees contend that Musicor was not the successor in interest to United Artists and that these 1964 manufactured licenses control.

In 1965 the appellees attempted to revoke the licenses, claiming a violation of the Copyright Act (Title 17, United States Code), but continued to do business with Musicor, including the issuance of additional licenses. Thereafter, three audits were conducted by the Harry Fox Agency

on a manufactured and sold theory. Musicor was not informed of any other type of arrangement until the third audit.

The action was commenced on October 18, 1968. (5a) Jurisdiction was alleged under Title 17 of the United States Code and 23 United States Code Section 1338(a). The issues for trial were determined on June 5, 1975 by a stipulation entered on the Record by Judge Griesa (PX 17, 708a-1). After trial without a jury, the District Court found, in the main for the appellees, awarding damages as follows:

- (a) \$9,644.51 with interest from December 1, 1967;
- (b) \$7,167.26 with interest from March 1, 1970;
- (c) \$3,024.00 with interest from April 1, 1968;
- (d) \$17,553.97 with interest from January 1, 1968;
- (e) \$6,617.16 with interest from January 1, 1968;
- (f) \$4,914.92 with interest from January 1, 1968;
- (g) \$3,106.37 with interest from January 1, 1968;
- (h) \$3,001.64 without interest; and

taxable costs.

Talmadge Productions Co., Inc., as successor to Musicor, was stipulated to be added as a defendant and bound by the judgment.

ARGUMENT

POINT I: WHETHER THE DISTRICT COURT SHOULD HAVE
DECLINED SUBJECT MATTER JURISDICTION TO
ENTERTAIN THIS ACTION

The gravamen of this action is nothing more than a contract-accounting procedure, not a copyright infringement as appellees claim. Although Judge Griesa retained jurisdiction under the copyright statute (Title 17, U.S.C.), the proper subject matter jurisdiction for this case is a state court. There is no federal question involved and no diversity of citizenship among the parties. Judge Griesa retained jurisdiction stating:

'The licenses relied on by plaintiffs refer to the compulsory licensing provision of Section 1(e) of the Copyright Act, 17 U.S.C. Section 1(e). The licenses closely parallel the terms of Section 1(e). Therefore this court has jurisdiction to try the claims. Shapiro, Bernstein & Co. v. Gabor, 266 F. Supp. 613 (S.D.N.Y. 1966); Joy Music, Inc. v. Sieco Records, Inc., 166 F. Supp. 549 (S.D.N.Y. 1958); 2 Nimmer on Copyright, Section 131.11, p. 572 (1974)" (Decision, p. 3).

It is appellant's contention that the Copyright Act has absolutely no applicability herein. Although the complaint is framed in terms of copyright infringement, all the issues were framed by a pre-trial order and stipulation, and the entire trial itself proceeded upon an accounting and contract theory. In fact, Judge Griesa himself mentioned this very fact several times during the proceedings:

'The Court: The way the action shapes up now, according to our stipulation, this is now a contract action." (Tr. 456a)

Indeed, it should be pointed out that absolutely no evidence was offered to support any claim of copyright infringement. The only time a claim was actually asserted was in 1965.. The appellees kept right on doing business with Musicor on the very same records allegedly covered by the copyright claim. On trial, when appellees' attorney attempted to go into the issue of terminating licenses for copyright infringement, the Court ordered Mr. Rich to refrain from inquiring as to this matter. (Tr. 553a) Mr. Rich was attempting to go into an area covered by the August 9, 1972 pre-trial order of Judge Ryan (Exhibit 17) which stated: "(iii)(f) on or about August 9, 1965 plaintiffs gave notice cancelling and terminating said license agreements with Musicor as a result of plaintiff's claim that Musicor failed to properly account and pay royalties to them....(g) Despite the notice of cancellation of the license agreements, Musicor continued to manufacture and sell phonograph records embodying the compositions without plaintiff's authorization, permission or consent after said termination." (PX 17, 708a-3 & 708a-4). This pre-trial order constituted the final framing of issues before the District Court and yet because of the evidence adduced at trial, Judge Griesa refused to allow the appellees to go into this area.

It is incomprehensible in light of these statements that Judge Griesa retained federal jurisdiction. The cases relied on by Judge Griesa (Joy and Shapiro) do not go deeply into the facts. If this were a claim that no royalties had been paid, then perhaps there would be federal jurisdiction. In fact, however, Musicor has paid \$118,998.65 in royalties to the appellees (PY 23, 710a), and the instant dispute is

not for a failure to pay royalties per se, but rather how much, if any, royalties remain to be paid.

"If the suit is one brought to enforce a right based upon a contract which relates to a copyrighted production, the suit is one which arises out of the contract and is not one arising under the copyright statute, and the federal courts are without jurisdiction. (citations omitted). It is well-settled that a suit for royalties reserved upon the sale of a patent right is not a suit arising under the patent laws... (citations omitted). In the last-cited case it is said (Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U.S. 282, 285, 22 Sup. Ct. 681, 46 L. Ed. 910): 'That the rule is well settled that, if the suit be brought to enforce or set aside a contract though such contract be connected with a patent, it is not a suit under the patent laws, and jurisdiction can only be maintained upon the ground of diversity of citizenship. The same principle applies to royalties under a copyright as to royalties under a patent. It is impossible to distinguish in principle between them. Carl Laemmle Music Co. v. Stern. 219 Fed 534, 135 C.C.A. 284. Danks v. Gordon, 272 F. 821 (2nd Cir. 1921).

In fact the Danks case has been cited for the same jurisdictional issue raised herein.

"State and not federal courts have jurisdiction in contract actions for non-payment of royalties arising out of the exploitation of copyrighted works." Wimmer, The Law of Copyright, 1960, p. 568, Section 151.11.

In the leading case of Golden West Melodies Inc. v. Capitol Records, Inc., 79 Cal. Rept. 442 (Ct. of App., 2nd Dist. Cal. 1960), this very question was presented. In holding that the state court did have jurisdiction, the court stated:

'In the present case, plaintiff seeks to recover royalties allegedly due under the agreement between plaintiff's predecessor and the defendant. Although the subject matter of the agreement related to statutory copyrights, the superior court has jurisdiction over the action. (4) There is a reference in

the agreement to Section 1-1 (sic) of the Copyright Act of the United States. There are provisions in the agreement for royalties of various amounts, ranging from 1 1/4¢ to 2¢ on records manufactured by defendant which amounts vary from the 2¢ royalty provided for in said section of the copyright act." (Golden West Melodies, *supra*, at 146).

This is precisely the situation here. Although the licenses make reference to the Copyright Act, they vary the royalty rates. It was on this basis that the California Court of Appeals upheld State Court jurisdiction. We are faced with a situation in which the statutory rates are not the central issue nor is violation of the Copyright Act. A State Court would have jurisdiction to control an accounting action which, in essence, is what this litigation concerns.

"Whether an action is one over which jurisdiction has been conferred on the federal courts by Congress must be determined from its nature and foundation and does not depend on the remote possibility that during its future course some question under the copyright laws may incidentally arise. Congress did not confer upon the federal courts jurisdiction to determine all questions of copyright title. The jurisdiction conferred is only over cases in which federal legislation defines 'the substance of the claim and the relief to be secured. Congress left a considerable residue of power on 'copyright questions' - among them questions arising in contract and title disputes.' *Harrington v. Mure*, *supra* [186 F. Supp. 655], at 658, 126 U.S.P.Q. at 509, and cases there cited." *Cresci v. Music Publishers Holding Corp.*, 210 F. Supp. 253, 135 U.S.P.Q. 189, 195 (S.D.N.Y. 1962).

Thus when Judge Cresca termed this a "contract" action, not only had he correctly assessed the nature of the suit, but, in fact, revealed the lack of federal jurisdiction.

An examination of the complaint herein, 243 pages in length, merely shows the lengths to which Appellees' counsel has gone in order to invoke federal jurisdiction. However, such assertions of copyright infringement are certainly not conclusive. This Court has often decried

the methods used to obtain federal jurisdiction when a state court is the appropriate forum.

"Despite the expansive language used thirty years ago in Meredith v. Winter Haven, 320 U.S. 228, 236-238, 64 S. Ct. 7, 88 L. Ed. 9 (1943), we do not believe that the Supreme Court today would demand that federal judges waste their time exploring a thicket of state jurisdictional law in a case such as this." Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenthal, 490 F. 2d 509, 516 (2nd Cir. 1973).

The case of T. B. Harris Co. v. Eliscu, 339 F. 2nd 823 at 828 (2nd Cir. 1964) states the law in this Circuit to be that "an action 'arises under' the Copyright Act if and only if the complaint is for a remedy granted by the Act, e.g., a suit for infringement or for the statutory royalties for record or reproduction." This is clearly not at issue here. It is not a question of the appellees recovering statutory royalties for infringement, but rather an accounting question in which it must be determined whether monies are owed, and if so, how much. Under these facts jurisdiction rests with the State Court.

Although 28 U.S.C. Section 1338(a) provides that the federal district courts' original jurisdiction over copyright actions 'shall be exclusive of the courts of the states,' the state courts clearly may pass on the validity of a copyright if it is necessary to do so in the course of deciding a case over which they do have jurisdiction. (citations omitted). Knickerbocker Toy Co., Inc. v. Fruittless Starch Co., 467 F. 2nd 501, 509 (U.S. Ct. of Cust. & Pat. App. 1972).

Thus, if there are any tangentially related points of copyright law in this litigation, a state court can certainly determine them. However, the mere whisper of copyright does not authorize a federal court, absent some other ground, to assume federal jurisdiction. Infringement, as used in copyright law, does not include everything that may impair the

value of the copyright; it is doing one or more of those things which Section 1 of the Act, 17 U.S.C. Section 1, reserved exclusively to the copyright owner." T. B. Harms Co. v. Eliscu, *supra*, at 825. An analogous situation is found in the case of Biematic Manufacturing Corp. v. Packaging Industries, Inc., 184 U.S.P.Q. 410 at 412 (S.D.N.Y. 1974), where the court determined that:

It has long been the law that not all cases involving patents or the interpretation of the patent laws fall within the jurisdiction of the federal courts under 28 U.S.C. Section 1338(a). Rather, the court must look to the claim asserted by the patent laws (e.g., a claim for infringement) or is based upon some right created by state law.

Thus, where a suit is based upon a license or royalty agreement and seeks specific performance or damages for breach of contract, the action does not 'arise' under the patent laws and a federal court has no jurisdiction over the case absent diversity of citizenship. Moreover, a state court may, if necessary to decide the case before it, determine questions involving the scope, validity or infringement of the patent." (footnotes omitted)

Recently, in the case of Elliot Ingber v. ABC Records, Inc., Civil No. 74-3716 (U.S.D.C., Central Dist. of Cal.) the court, in a case very similar to the instant proceeding, held that neither the Joy nor the Shapiro case, nor Nimmer on Copyrights would sustain federal jurisdiction in what is in reality a state court accounting.

Thus, there can be no question that federal jurisdiction is lacking herein and the case should be dismissed.

POINT III: WHETHER THE LICENSES, AS APPLIED
TO MUSICOR, ARE PROPERLY BASED ON
A 1 1/2¢ RATE FOR ALL PRE-1964
RECORDINGS USED IN ALBUMS, AND
WHETHER ALL RECORDS SHOULD BE ACCOUNTED
FOR ON A MANUFACTURED AND SOLD BASIS

As described above, licenses had originally been issued to United Artists on a manufactured and sold basis. United Artists would be obligated to pay 2¢ per record sold (Tr. 312a). This means that unless the licensee is able to sell copies of the record, no money is due under the license. This is the common industry practice, although the Copyright Act provides a payment of royalties on the basis of each and every record manufactured. (Defendant's Exhibits II and JJ). This was clearly revealed to the court below:

"Question (by Mr. Cohn): Mr. Berman (Albert Berman, managing director of the Harry Fox Agency), based upon your experience and expertise would it be fair to say that custom and usage in the trade would provide for licenses in a situation such as we have in this case between Schroeder and Musicor on a manufactured and sold basis rather than a manufactured basis?"

* * *

"Answer: Normally licenses are issued on the basis of records manufactured and sold." (Tr. 303a)

Apart from Mr. Berman, the appellants' expert witness testified to precisely this issue:

"Question (by Mr. Cohn): In the course of your dealings as a music publisher over the past twenty-five years, Mr. Nocell, have you treated licenses - on what basis have you treated licenses with those who record pursuant to licenses which you issue on a manufactured basis or a manufactured and sold basis?"

* * *

"Answer: On a manufactured and sold basis."

"Question: Without exception?"

"Answer: Yes, without exception."

"Question: And is it your testimony - I will ask you, is that the custom and usage in the industry?"

"Answer: Yes, it is." (Tr. 481a-482a)

(See also testimony of Marvin William Krasilovsky,

music copyright attorney. (Tr. 580a-581a)

Thus it is clear beyond peradventure that the normal practice within the record industry is to issue licenses on the basis of manufactured and sold rather than on manufactured. Such was the case with the United Artists licenses. Such constitutes an industry-wide procedure. Additionally, even the Harry Fox Agency and its auditors Prager and Fenton believed that the licenses were on a manufactured and sold basis.

"Question (by Mr. Cohn): Is it a fact that in connection with all three of the Harry Fox audits, that all three were done and reported to you on a basis of manufactured and sold?"

"Answer: That's true."

"Question: And that in none of them is there a segregation as to any licenses on a basis of manufactured only?"

"Answer: None whatsoever." (Tr. 364a-365a)

When the United Artists licenses were issued, the purpose was to allow the production and distribution of certain musical compositions under the Musicor label. In 1964 Musicor took over the distribution of its records from United Artists. In fact, prior to 1964, even the licenses issued to United Artists bore the inscriptions 'M or 'S (followed by a number signifying 'Musicor Monoaural' or 'Musicor Stereo.' These same numbers appeared on the records themselves. These precise insignias were retained by Musicor after October 1964, and, in fact, appeared on what are purported to be new licenses issued by January, Arch and Sealark.

"Question (by Mr. Cohn): The actual license agreements read to United Artists Records and on the license agreement there is contained a reference by initials to Musicor labels, is that right?"

"Answer (by Mr. Talmade): Yes."

"Question: Is that the case in each and every one of the licenses?"

"Answer: Yes." (Tr. 343-344a. See also Tr. 548-549a)

Thus for all intents and purposes, United Artists, when distributing Musicor records, was merely exercising rights granted to Musicor.

"Without limiting the generality of the foregoing, Distributor shall have the sole and exclusive right...to release phonograph records, tapes and/or recordings made from the Masters under the name, trademark or label of MUSICOR. Distributor shall have the right but not the obligation to include on the labels of all records sold hereunder and in all advertising and publicity material for said records the words 'Distributed by UNITED ARTISTS RECORDS, INC.' or words of similar import" (Dk 2, 724a-725a)

Appellees allege that soon after Talmadge purchased Schroeder's stock in Musicor, new licenses were issued which obligated Musicor to pay royalties for each record manufactured, thus altering not only the industry-wide practice, but also the United Artists licenses which applied to Musicor as United Artists' successor in interest. The truth is that although Schroeder attempted to issue new licenses, they were superfluous as Musicor was properly operating under the United Artists licenses and was under no obligation to accept new licensing agreements.

Upon learning of what Schroeder was intending to do, Talmadge rejected these proposed licenses stating:

"We have licenses that you issued through your various publishing companies as the head of the publishing companies to Musicor when they were being distributed, when Musicor was being distributed by the United Artists, and these are the licenses which we are paying our royalties and are now in effect and will continue to be in effect as long as these same recordings are issued under the label Musicor." (Tr.358a-359a)

It is significant that no other music publishers who had dealt with United Artists, apart from the Schroeder group, found it necessary to issue new licenses to Musicor after Musicor had terminated its contract with United Artists.

At trial, appellees' counsel produced a series of licenses which provided for payment of royalties on the basis of all records manufactured. However, appellees were unable to prove that Talmadge or anyone else at Musicor had signed these licenses. Significantly, even the licenses allegedly issued to Musicor after October 1964 specifically stated: "this license does not supersede nor in any way affect any prior licenses now in effect respecting recordings of said musical composition." (PX 1-4, 650a) Thus Musicor properly operated under the prior licenses issued to United Artists on behalf of Musicor.

"Question (by Mr. Cohn): Mr. Talmadge, have you received Exhibit HH, which was premarked by the defense? Exhibit HH contains the licenses issued by the Schroeder entities to United Artists records for the recording of records involved in this case under the Musicor label.

"Answer: Yes, sir. These are the licenses issued to Musicor and United Artists.

"Question: Are these the licenses which Musicor has operated under at all times involved in the litigation in this suit?

"Answer: Yes." (Tr. 347a)

In the court below, appellees argued that because the prior licenses had been issued to United Artists, not to Musicor, new licenses were necessary. Not only was this not the case (as seen by the fact that no other publisher felt constrained to do so), but, in fact, Musicor, as successor in interest to United Artists, was perfectly justified in using the prior licenses.

"Question (by Mr. Cohn): Is it a fact that each and every one of these licenses provides a grant by the Schroeder Corporations to United Artists Records, its successors and assigns?

"Answer: Yes. That's what it states.

"Question: On each and every license?

"Answer: Yes.

"Question: Did there come a time when Musicor acquired the rights of United Artists to these licenses and to the Fitney recordings?

"Answer: Yes.

"Question: When was that?

"Answer: That was subsequent to May 8, 1964. (tr. 348a-349a)

There was absolutely no need for the new licenses, and the appellees were well aware of Musicor's position as successor in interest:

"Question (by Mr. Cohn): And Musicor became the successor to United Artists?

"Answer (by Abby Schroeder): That is right, independently." (Tr. 540a)

The question of Musicor's relation to United Artists is not merely a legal question, but, as in the case of manufactured versus manufactured and sold, the acceptance of this association within the industry is critical.

"Question (by Mr. Cohn): All right, Mr. Krasilovsky, drawing upon your expertise within the industry and in this field of law, did Musicor become the successor to United Artists with reference to the licenses from the Schroeder interests to United Artists?

* * *

"Answer: I am quite familiar with the distribution deal. Exclusive distribution deal is exemplified by Exhibit Z. The right to continue to distribute and sell ceased under Exhibit Y and the successor in distributing and selling of the masters referred to is clearly given up to the addressee, which is Musicor Record Corporation.

* * *

"Question: Your testimony is as of that date on their acquisition of the rights to the masters, Musicor became the successor under the terms of the licenses to United Artists?

"Answer: Musicor became the successor of the rights that previously were exercised and owned or controlled by United Artists." (Tr. 579a-580a) (See also Tr. 588a-589a)

It is inconceivable that Talmadge would pay \$160,000 for Schroeder's interest in Musicor unless he believed he had a viable product. His conclusion as to this was based on the United Artists licenses which he expected to come into possession of. An additional incentive was provided by Mr. Schroeder when he agreed to only charge royalties at the rate of 1 1/2¢ on all pre-May 8, 1964 recordings used in albums.

"I then mentioned to Schroeder of a discussion

that we had prior to the purchase of the company, that the purchase price was extremely high and that as a concession and the fact that I was enjoying the reputation in the industry as one of the top merchandisers in the field, that I would have these various recordings by Penn Pitney reissued and that we had discussed, and he had agreed that all the recordings contained in the albums issued by United Artists and distributed by them would then contain a 1 1/2¢ rate for those recordings done prior to May 8, 1964 as used in albums only." (Tr. 358a)

This agreement was confirmed in a letter dated June 8, 1964 from Herbert Noelis, Esq., a member of the bar and a specialist in the area of copyright law, who negotiated the 1 1/2¢ rate with Schroeder, to Talmadge:

"Dear Art. Aaron Schroeder says he will allow a 1.5 per cent rate on all pre-1964 recordings only if used in albums. All new recordings will be as per producer's agreement at statutory rates. Sincerely," signed Herbert Noelis. (DX LL, 848a)

Thus we have Musicor properly acting under the United Artists licenses but at the reduced rate of 1 1/2¢ for each pre-1964 album recording manufactured and sold. Even licenses subsequently issued specifically stated that no prior licenses were superseded thus making the United Artists licenses applicable. (PX 1-4, 650a). Furthermore, the evidence of common practice within the industry as to the general and widespread use of manufactured and sold overcomes any presumption that royalties were due solely on records manufactured.

Moreover, a substantial portion of the award made by the court below involved the records of M2008 and MS3008. Included in these record albums are fourteen songs of the Schroeder company, only one of which was not recorded prior to 1964 (DX III 8 ff., 751a-845a). Only one of these, "I'LL NEVER STOP DREAMING," was recorded after 1964. This is readily seen from the licenses referred to above. Thus, rather

than applying the 2¢ rate, as Judge Griesa did, the 1 1/2¢ rate, pursuant to the Moelis letter, is determinative thereof. Had this been done, a substantial amount of the award would have been revealed as improper.

The 1 1/2¢ issue, almost totally ignored by the trial court, is of monumental significance. It must be again recalled that Talmadge paid \$160,000 to Schroeder for the latter's interest in Musicor. Unless Talmadge was assured that he could make a profit, he could not, as a reasonable business man, have purchased Schroeder's interest. The United Artists licenses, based on manufacturing and sold, plus the 1 1/2¢ rate gave him this expectation. As United Artists' successor in interest, Musicor should have received the benefit of these licenses based on manufactured and sold. When this is coupled with the 1 1/2¢ rate as described in the Moelis letter, the true standard of calculation is revealed.

Tangentially related to this issue are the amounts due to appellees under the Harry Fox audits. They were conducted on a manufactured and sold basis, and it was only until the final audit that Musicor was aware of any allegation that Fox was not settling for the Schroeder group. (Tr. 383, ll. 18-25). With Harry Fox as its agent settling their claims, appellees are estopped to deny the settlements with Musicor. Gilmore v. Royal Indem. Co., 240 F. 2d 101 (5th Cir. 1957); Harvey Radio Laboratories v. United States, 115 F. Supp. 444 (Ct. of Claims, 1953). Having settled on all but the third audit, only minimal royalties, if any, are due.



CONCLUSION

The appellant is entitled to a reversal of judgment entered below. This is predicated upon several grounds. The District Court clearly erred in granting judgment for the amounts it so ordered. Judge Griesa inaccurately calculated the amounts, if any, due under the Fox Audits, failed to recognize the 1 1/2¢ rate on all pre-1964 album recordings, and, additionally, incorrectly ruled that the United Artists' licenses did not inure to the benefit of Musicor. The District Court clearly should have declined subject matter jurisdiction in this action, and we would submit that this Court should either dismiss the complaint for lack of jurisdiction, or, in the alternative, reverse the decision of the District Court and remand for a new determination of the amount of monies, if any, due to the appellees.

Respectfully submitted,

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